SUPREME COURT, U. S.
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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1714

UNITED STATES OF AMERICA and
ROBERT D. CATLOW, Special Agent
of the Internal Revenue Service,
Respondents,

v.

ARTHUR ANDERSEN AND COMPANY,
Respondent,
and

BARDAHL MANUFACTURING CORPORATION,
a corporation; OLE BARDAHL and
INGA L. BARDAHL, his wife,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	9
Appendices:	
Appendix A	A-1
Appendix B	A-3
Appendix C	A-4

TABLES OF AUTHORITY

Table of Cases

Donaldson v. United States, 400 U.S. 517 (1971) 4, 5, 6

Reisman v. Caplin, 375 U.S. 440 (1964) 5, 6, 7, 8, 9

Statutory Provisions

U.S. Const. amend. V 2, 5, 9

Statutes

Int. Rev. Code § 7402 2

§ 7602 ..... 2, 3

§ 7604 2

28 U.S.C. § 1254(1) 2

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 15, 1974.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not reported. The opinion of the United States District Court (App. B, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether individual and corporate taxpayers being subjected to a criminal tax investigation have been denied due process of law by the lower court's refusal to permit taxpayers to intervene and be heard in a proceeding to enforce an Internal Revenue Service summons issued to respondent Arthur Andersen and Company ("Andersen"), pursuant to which the government has demanded that Andersen's Milan, Italy office produce for examination its audit records pertaining to an Italian subsidiary corporation of the corporate taxpayer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the Constitution of the United States and of Sections 7402, 7602 and 7604 of the Internal Revenue Code of 1954, as amended, are set forth in Appendix C, *infra*.

STATEMENT OF THE CASE

This action, brought under the authority of Sections 7402 and 7604, was commenced on September 4, 1973 in the United States District Court by petition of the government and Robert D. Catlow, Special Agent of the IRS, for enforcement of a summons issued by Special Agent Catlow on June 14, 1973 to the respondent Arthur Andersen and Company, 501 Norton Building, Seattle, Washington.

This summons, issued pursuant to Section 7602, directed Andersen to appear before Special Agent Catlow to give testimony and produce the following records relating to the tax liability of petitioners Ole Bardahl and Inga L. Bardahl and Bardahl Manufacturing Corporation (hereinafter collectively referred to as "taxpayers"):

> "Audit working papers, permanent files, annual audit reports, and correspondence files relative to Bardahl International Oil Corporation, S.p.A. (an Italian corporation) Milan, Italy."

Bardahl International Oil Corporation, S.p.A. ("BIOC"), is a wholly-owned subsidiary of Bardahl Manufacturing Corporation ("BMC") and Ole and Inga L. Bardahl are the controlling shareholders of BMC.

Andersen made available to Special Agent Catlow the summoned records located in Andersen's Seattle, Washington office. Special Agent Catlow, however, further demanded that Andersen produce those records described in the summons which were located in Andersen's Milan, Italy office. In accordance with this demand, counsel for Andersen directed a letter to Special Agent Catlow advising him that Andersen would, unless directed to the contrary, voluntarily produce the documents demanded by Special Agent Catlow located in its Milan, Italy office for inspection by the IRS.

Counsel for taxpayers was also advised of this letter and on July 19, 1973 taxpayers filed an action for injunctive relief in the United States District Court for the Western District of Washington captioned Bardahl Manufacturing Corporation, et al. v. Donald C. Alexander, as Commissioner of Internal Revenue, et al., No. 442-73C2. On July 20, 1973, a hearing was held in the District Court, the Hon-

orable William N. Goodwin presiding, and a temporary injunction was entered restraining Andersen from complying with the summons until ordered to do so by a court of competent jurisdiction.

The government filed a petition to enforce this summons on September 4, 1973 and taxpayers moved for leave to intervene in the proceeding. Taxpayers filed a proposed answer with their motion for leave to intervene and submitted memoranda in support of such motion. By letter order of September 28, 1973, the District Court denied taxpayers' motion for leave to intervene based on *Donaldson v. United States*, 400 U.S. 517 (1971). Mr. W. M. Lodine, a partner in Andersen's Seattle, Washington office, had previously filed an affidavit with the court stating that Andersen would continue to honor the temporary injunction entered by Judge Goodwin until directed by the court to the contrary. Mr. Lodine's affidavit further stated that Andersen would not be represented at the hearing on the order to show cause. In view of this affidavit and the previous letter sent by Andersen's counsel to Special Agent Catlow indicating Andersen had no objection to production of the summoned documents, there was no hearing on the order to show cause.

Pursuant to the District Court's order entered on September 28, 1973, Andersen was directed to comply with the above-described summons by producing the records described therein for examination by the IRS. Taxpayers filed a notice of appeal from the order denying their motion for leave to intervene and moved for a stay of enforcement of the District Court's order pending appeal which was denied. Thereupon taxpayers moved for a stay pending appeal

in the United States Court of Appeals for the Ninth Circuit which was granted. The Ninth Circuit heard this appeal and on February 15, 1974 affirmed the order of the District Court.

The records located in Andersen's Milan, Italy office which the government seeks to obtain by this summons have not yet been disclosed to the IRS as a result of proceedings instituted in the Italian courts by BIOC.

REASONS FOR GRANTING THE WRIT

The courts below erroneously applied this Court's decision in *Donaldson v. United States, supra,* to prevent the intervention of taxpayers in a proceeding to enforce an IRS summons issued to a third party thereby denying taxpayers due process of law under the Fifth Amendment. This case involves important questions concerning the rights of taxpayers to intervene and be heard in such enforcement proceedings as provided by this Court's earlier decision in *Reisman v. Caplin*, 375 U.S. 440 (1964). The decisions of the lower courts in the instant case effectively eliminate the rights of taxpayers to intervene in such proceedings notwithstanding the existence of a significant confidential relationship between the taxpayer and the witness summoned by the government.

Taxpayers contend that the standard for intervention in the case at bar is controlled by *Reisman* because *Donaldson* is distinguishable and, for that reason, plainly inapposite.

Donaldson involved the issuance of an IRS summons to the taxpayers' former employer ("Acme") and to Acme's accountants for the production of Acme's records of the taxpayer's compensation for the years under investigation. The Court made it clear that the taxpayer had no interest

in the records sought by the government other than a desire to overcome the willingness of the witnesses to produce records of wage payments from Acme to the taxpayer which would be extremely relevant to the investigation. More importantly, *Donaldson* is distinguishable because no relationship whatsoever existed between the taxpayer and the summoned witness under the facts of that case as illustrated by the following:

> "Neither is it a case where the summons is directed at the taxpayer's records in the hands of his attorney or his accountant, with the attendant questions of privilege, or even in the hands of anyone with whom the taxpayer has a confidential relationship of any kind." 400 U.S. at 523.

The existence of such a confidential relationship in the instant case supports the taxpayers' right to intervene in the District Court under the principles of the *Reisman* decision.

Taxpayers submit that *Reisman* is controlling where an IRS summons is issued to a corporate taxpayer's accountants, and that decision requires that such taxpayer be permitted to intervene in enforcement proceedings. Issuance of a summons to the taxpayer's accountant to obtain the work product of that accountant is exactly the situation presented in *Reisman*. Under those facts, this Court held the taxpayer had an adequate remedy at law and could not maintain an action for injunctive relief when the only affirmative action taken by the government was the issuance of the summonses to the accountants. This remedy, when the accountant indicates a willingness to turn the papers over to the IRS, is for the taxpayer to restrain compliance until compliance is ordered by a court of competent jurisdiction.

In a subsequent proceeding brought to enforce compliance with the summons, *Reisman* provides that parties affected by the disclosure may intervene in District Court and challenge the summons by asserting their claims. Furthermore, this Court defined the nature of the enforcement proceedings as follows:

> "Any enforcement action under this section would be an *adversary proceeding* affording a judicial determination of the challenges to the summons and giving complete protection to the witness." 375 U.S. at 446. (Emphasis added)

Where a taxpayer is required to seek injunctive relief agains the summoned witness as here, it is obvious the witness will not challenge the summons. As a result, there will be no adversary proceeding unless taxpayers are permitted to intervene and challenge the summons. This right of intervention permits the taxpayers, in the same manner as a witness, to challenge enforcement of the summons on any appropriate ground.

Taxpayers have set forth affirmative defenses in their proposed answer which constitute appropriate grounds for challenging enforcement of the summons issued by Special Agent Catlow. Only by permitting intervention and allowing taxpayers to cross-examine the governmental agents can the court determine the validity of these challenges in in adversary proceeding.

Taxpayers submit that an adversary proceeding in the District Court may produce testimonial evidence supporting taxpayers' affirmative defenses by the cross-examination of the IRS agents. For example, taxpayers have alleged as an affirmative defense that the accountants fully complied with the summons by producing the records demanded

which exist in the accountant's Seattle, Washington office—the office address designated on this summons. Examination of Special Agent Catlow could establish whether he had the opportunity to inspect these records and whether additional summonses were issued to Andersen at other branch offices in the United States or in Italy by the IRS Office of International Operations. In the case at bar, the IRS should have issued separate summonses to each of Andersen's branch offices, as the government did in *Reisman*, instead of issuing one summons to the Seattle branch whose scope, the government alleges, reaches all records in the possession of Andersen pertaining to BIOC, whether located in the United States or any foreign country. Testimony from Special Agent Catlow on this issue may establish taxpayers' affirmative defenses of full compliance and that the records demanded were beyond the scope of the summons.

The summons in the instant case was directed to an international firm which was acting in a dual capacity as the accountants for BMC in the United States and for BIOC in Italy. Taxpayers contend that this additional factor has little relevance and should not affect the application of *Reisman* to the instant case.

Moreover, the confidential relationship between the summoned witness and the taxpayer, clearly present in *Reisman*, also exists between BMC and Andersen. As the parent corporation of BIOC, BMC has the power to designate the accountants employed to audit BIOC's financial records. In a closely held corporation such as BMC, confidentiality of the corporation's financial records, including those of the subsidiaries, is of utmost importance to the owners of the

corporation. Corporate records are made available to the accountants for audit purposes based on this confidential relationship and the accountant's work product, which the government is now demanding, is derived directly from those records.

In view of this confidential relationship, both the parent corporation and its controlling shareholders have an extremely significant interest in the work product of the accountants. This interest is of sufficient magnitude to warrant protection and requires that taxpayers be permitted to intervene and be heard in the District Court under the principles of the *Reisman* decision. Without such opportunity, taxpayers have been denied due process of law as guaranteed by the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH H. TRETHEWEY
GERALD R. HERGERT of
TRETHEWEY & BRINK
Attorneys for Petitioners

May 1974

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and ROBERT D. CATLOW, Special Agent of the Internal Revenue Service, *Petitioners-Appellees,* v. ARTHUR ANDERSEN AND COMPANY, *Respondent,* and BARDAHL MANUFACTURING CORPORATION, a corporation; OLE BARDAHL and INGA L. BARDAHL, his wife, *Applicants for Intervention-Appellants.*	No. 73-2901 ORDER

[February 15, 1974]

Before: MERRILL, HUFSTEDLER, and WRIGHT, Circuit Judges.

Appellants seek to intervene in a proceeding to enforce an Internal Revenue summons issued to an accounting firm for records of that firm which pertain to an Italian subsidiary of the corporate taxpayer. The respondent accounting firm produced the summoned records in its Seattle office and indicated its willingness to produce the records kept in its office in Italy.

Appellants asserted a number of possible affirmative defenses in support of their motion to intervene. The district court in the exercise of its discretion denied intervention. Intervention in this situation is permissive rather than mandatory. *Donaldson v. United States,* 400 U.S. 517 (1971).

In light of *Donaldson* and *Couch v. United States*, 409 U.S. 322 (1973), the district court's denial of permissive intervention was proper.

Appellants ask that we remand this case to the district court for consideration of a treaty between the United States and Italy, or that, in the alternative, we take judicial notice of a proceeding in an Italian court with reference to this matter. These requests are denied, they bearing no relevance to appellants' motion for intervention.

Affirmed. Let the mandate issue now.

APPENDIX B

September 28, 1973

Mr. Jeffrey D. Snow
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Mr. Charles F. Mansfield
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Gentlemen:

RE: United States of America and Robert D. Catlow, Special Agent of the Internal Revenue Service

v.

Arthur Andersen and Company
WD Cause No. 37-73H2

The application of Bardahl Manufacturing Corporation, Ole Bardahl and Inga L. Bardahl, his wife, for an Order of Intervention in the above-entitled cause is denied.

The basis for the Court's ruling is *Donaldson v. United States*, 400 U.S. 517 (1970), where the Court makes it clear that intervention by the concerned taxpayer is not a matter of right. In fact, the Court stated that ". . . we agree with the opposing conclusion . . .".

Intervention by the taxpayer may be allowed under proper circumstances, but the Court finds that the circumstances stated by the taxpayer here do not justify an Order of Intervention.

Yours truly,

s/ WALTER T. McGOVERN
United States District Judge

APPENDIX C

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

Fifth Amendment

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Sections 7402, 7602, and 7604 of the Internal Revenue Code of 1954, 26 U.S.C. 7402, 7602, and 7604, provide in pertinent part as follows:

> SEC. 7402. JURISDICTION OF DISTRICT COURTS:
>
> • • •
>
> (b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.
>
> • • •
>
> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account

containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1714

BARDAHL MANUFACTURING CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioners seek to bar the enforcement of an internal revenue summons issued upon Arthur Andersen and Company, a public accounting firm, in connection with an investigation of their tax liabilities for the years 1966 through 1971. The summons called for the production of records belonging to Arthur Andersen and Company, which pertained to Bardahl International Oil Corporation, S.p.A., an Italian corporation (R. 8).[1]

In the district court proceeding brought by the government to enforce the summons, Arthur Andersen and Company represented that it was willing to comply with the summons as soon as ordered to do so (R. 17-18). The

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[1] "R." references are to the duplicated Record on Appeal.

district court denied petitioners' attempt to intervene in the summons enforcement proceeding (Pet. App. B) and the court of appeals affirmed (Pet. App. A).

2. In *Reisman* v. *Caplin*, 375 U.S. 440, this Court noted that a proposed witness or any interested party may attack an internal revenue summons before the hearing officer, as well as before the district court in any ensuing enforcement proceeding. However, the Court pointed out that the district court might allow such intervention upon a showing that "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution" or where "it is protected by the attorney-client privilege" (375 U.S. at 449). But as the Court subsequently made clear in *Donaldson* v. *United States*, 400 U.S. 517, 530, *Reisman* does not mean that "a taxpayer may intervene [in a summons enforcement proceeding] as of right simply because it is his tax liability that is the subject of the summons." The Court in *Donaldson* held that the taxpayer did not have a significantly protectable interest (entitling him to intervene) in summoned records belonging to his former employer and its accountant relating to the taxpayer's compensation during the years under investigation.

Petitioners urge (Pet. 5) that they have a "confidential relationship" with Arthur Andersen and Company which makes this case distinguishable from *Donaldson* v. *United States*, 400 U.S. 517, upon which both courts below relied. But the only relationship which appears from the record is between Arthur Andersen and Company and Bardahl International Oil Corporation, S.p.A., an Italian corporation. That entity does not have any obligation to petitioners with respect to the records sought which could form the basis of a priv-

ilege. At all events, even if Arthur Andersen is deemed to be petitioners' accountant, there is no accountant-client privilege recognized in the federal courts. See *Couch* v. *United States*, 409 U.S. 322, 335, and cases there cited.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[2]Moreover, even if after production of the items sought, any court should rule that petitioners did have a protectable interest, by way of privilege or otherwise, petitioners may assert that interest in any subsequent trial. See *Donaldson* v. *United States, supra*, 400 U.S. at 531.

DOJ-1974-09